Public Prosecutor v Sa'ari bin Jusoh

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–64 OF 2006(J)
ALAUDDIN, NIK HASHIM, AUGUSTINE PAUL, ABDUL AZIZ MOHAMAD AND HASHIM YUSOFF FCJJ
30 JANUARY 2007

Criminal Procedure — Prosecution — Prosecution's case — Opening address — Whether prosecution's case restricted to what was stated in opening address although evidence showed proof of alternative charge

Evidence — Presumption — Drug trafficking — When presumption could be invoked when opening address by prosecution referred only to sale of dangerous drugs

Words and Phrases — 'Selling' — Dangerous Drugs Act 1952 s 2

The accused (the respondent) was charged for trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The trial judge was of the view that the prosecution had made out a case against the respondent based on the presumptions contained in ss 37(d) and 37(da) of the Act. At the conclusion of his case the respondent was found guilty, convicted and sentenced according to law. His appeal to the Court of Appeal was allowed with a substitution of the conviction under s 39B(1)(a) of the Act with one under s 12(3) read with s 39A(2) of the Act. This appeal was by the prosecution against the order made by the Court of Appeal. It was observed by the Court of Appeal that the case for the prosecution was that the respondent sold the drugs in question to PW7 and had thereby trafficked in it. In his submission the prosecution argued that the act of 'selling' within the meaning of s 2 of the Act does not require the purchase price to be paid upon delivery of the dangerous drugs. It was also submitted in the alternative that since the Court of Appeal had found that the respondent was in actual possession of the drugs, the presumption of trafficking ought to have been invoked. In commenting on the alternative submission of the prosecution, learned counsel said that there could be no reliance on the presumption of trafficking as the opening address was confined to a sale only. The submissions of both parties raised two issues for consideration: (1) the meaning of the expression 'selling' in s 2 of the Act; and (2) whether there could be reliance on the presumption of trafficking in view of what was stated in the opening address.

Held, allowing the appeal:

(1) (per **Augustine Paul FCJ**) A sale is complete upon transfer of the property in

the goods even though the price has not been paid. A sale in this sense cannot therefore be described as an act preparatory to the sale or as negotiations leading to the sale or even as an agreement for a sale. The Court of Appeal had therefore erred in its construction of the expression 'selling' in the definition of 'trafficking' in s 2 of the Act with the result that the substitution of the conviction of the accused on this ground could not be sustained (see paras 15–16).

(2) (per **Augustine Paul FCJ**) The opening address clearly referred to only an act of selling dangerous drugs. There was no reference to possession of the dangerous drugs by the accused. Thus what was stated only required proof of the circumstances that led to the sale. It was those circumstances that the defence would be required to rebut and not the fact of whether the accused was or was not in possession of the dangerous drugs. The activation of the presumption of trafficking, on the other hand, requires proof of possession. As no indication of this mode of proof of the case for the prosecution is contained in the opening address, the question that required to be addressed was whether there could be a conviction on a basis which had not been disclosed (see para 18).

(3) (per **Augustine Paul FCJ**) A verdict can be founded on a basis not indicated by the prosecution in its opening address. But it must be done in such a way so as not to place the accused at a tactical disadvantage with resultant unfairness to him. This conclusion is consistent with s 422 of the Criminal Procedure Code (see para 27).

(4) (per **Augustine Paul FCJ**) The determinative factor whether the prosecution could rely on the presumption of trafficking when the opening address only referred to the sale of dangerous drugs was whether the defence had the opportunity to meet the new basis for conviction. A similar test is also applicable when the prosecution leads evidence to which no reference has been made in the opening address. It follows that it cannot be automatically excluded without any consideration of the element of prejudice. Where the procedures just described have not been followed the burden will be on the defence to show the manner in which it has been prejudiced followed with a reply by the prosecution (see para 30).

(5) (per **Augustine Paul FCJ**) The objection of learned counsel to the use of the presumption of trafficking against the accused was not supported by particulars of the prejudice that the defence may suffer. The task therefore fell on this court to determine whether the accused will suffer any prejudice if the presumption of trafficking is invoked against the accused. The activation of the presumption of trafficking under s 37(da) of the Act requires proof of actual possession of the dangerous drugs by the prosecution. The evidence adduced by the prosecution showed that the accused was in actual possession of the drugs. The facts that the accused cross examined the prosecution witnesses on the issue of possession; that he was given an opportunity to recall witnesses for the prosecution and that his defence was one of negating possession mean that he would not be prejudiced as a result of a conviction based on possession.

Accordingly the presumption of trafficking under s 37(da) of the Act could be invoked against the accused as there was evidence of actual possession (see paras 31–32).

(6) (per **Abdul Aziz FCJ**) One ought not to look at the definition of a word in a statute in a legal dictionary to determine the ordinary meaning because the legal dictionary is apt to include meanings that have been extended by particular statutes beyond their ordinary meaning to give effect to the policy behind the statutes. The intended meaning for 'selling' is 'to … deliver … goods … for money'. So long as the delivery is for money — which the delivery in this case was — as opposed to delivery as a gift or on some other basis, it is selling even though the money for which the goods are delivered has not passed to the seller. Therefore, the act of selling takes place once the goods are transferred or delivered even though the price has not been paid (see paras 38, 40–41).

[Bahasa Malaysia summary

Tertuduh (responden) telah didakwa atas mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Hakim bicara berpendapat bahawa pendakwaan telah membuktikan kes terhadap responden berdasarkan anggapan yang terkandung di dalam ss 37(d) dan 37(da) Akta tersebut. Semasa membuat kesimpulan kesnya, responden telah didapati bersalah, disabitkan dan dihukum menurut undang-undang. Rayuannya kepada Mahkamah Rayuan telah dibenarkan dengan menggantikan sabitan di bawah s 39B(1)(a) Akta tersebut kepada s 12(3) dibaca bersama dengan s 39A(2) Akta tersebut. Rayuan ini adalah oleh pihak pendakwaan terhadap perintah yang dibuat oleh Mahkamah Rayuan. Apa yang diperhatikan oleh Mahkamah Rayuan bahawa kes bagi pihak pendakwaan adalah responden telah menjual dadah yang dipersoalkan kepada PW7 dan oleh itu telah mengedarnya. Di dalam hujahannya, pendakwaan menegaskan bahawa perbuatan 'menjual' termasuk di dalam maksud s 2 Akta tersebut tidak memerlukan harga belian untuk dibayar semasa penghantaran dadah berbahaya tersebut. Adalah dihujahkan juga secara alternatif bahawa semenjak Mahkamah Rayuan mendapati bahawa responden adalah pemilik sebenar dadah tersebut, anggapan mengedar seharusnya digunakan. Dalam ulasan ke atas hujahan alternatif pihak pendakwaan, peguamcara yang bijaksana menyatakan bahawa tiada pergantungan terhadap anggapan mengedar yang mana ucapan pembukaan adalah terbatas kepada jualan sahaja. Hujahan kedua-dua pihak membangkitkan dua isu untuk dipertimbangkan: (1) maksud penyataan 'penjualan' di dalam s 2 Akta tersebut; dan (2) sama ada terdapatnya pergantungan terhadap anggapan pengedaran memandangkan apa yang telah dinyatakan di dalam ucapan pembukaan.

Diputuskan, membenarkan rayuan:

(1) (oleh **Augustine Paul HMP**) Satu-satu penjualan adalah lengkap semasa pemindahan harta bentuk barangan walaupun harga belum dibayar. Penjualan dalam maksud ini tidak boleh digambarkan sebagai satu tindakan persediaan kepada penjualan atau sebagai rundingan yang menjurus kepada penjualan

atau walaupun sebagai satu persetujuan bagi penjualan. Oleh itu, Mahkamah Rayuan adalah salah dalam penafsirannya berkenaan dengan pernyataan 'penjualan' di dalam tafsiran 'pengedaran' dalam s 2 Akta tersebut, oleh yang demikian, penggantian sabitan tertuduh di atas alasan ini tidak boleh dikekalkan (lihat perenggan 15–16).

(2) (oleh **Augustine Paul HMP**) ucapan pembukaan dengan jelasnya merujuk kepada tindakan menjual dadah berbahaya. Adalah tidak merujuk kepada pemilikan dadah berbahaya oleh tertuduh. Oleh itu, apa yang dinyatakan hanya memerlukan bukti keadaan yang menjurus kepada penjualan. Ianya adalah keadaan yang mana pembelaan dikehendaki untuk mematahkannyadan bukannya fakta sama ada tertuduh memiliki atau tidak memiliki dadah berbahaya. Pengaktifan anggapan pengedaran, dalam erti kata lain memerlukan bukti milikan. Oleh kerana tidak terdapatnya petunjuk berkenaan cara pembuktian untuk pihak pendakwaan adalah terkandung di dalam ucapan pembukaan, persoalan yang perlu untuk disampaikan adalah sama ada terdapatnya sabitan yang berasas yang mana tidak didedahkan (lihat perenggan 18).

(3) (oleh **Augustine Paul HMP**) Satu keputusan boleh didapati atas satu asas yang tidak dinyatakan oleh pihak pendakwaan di dalam ucapan pembukaan. Tetapi ianya mestilah dilakukan sebegitu supaya tidak meletakkan tertuduh pada taktik yang tidak menguntungkan dengan ketidakadilan yang timbul ke atasnya. Kesimpulan ini adalah selaras dengan s 422 Kanun Tatacara Jenayah (lihat perenggan 27).

(4) (oleh **Augustine Paul HMP**) Faktor penentuan adalah sama ada pihak pendakwaan boleh bergantung kepada anggapan mengedar apabila ucapan pendahuluan hanya merujuk kepada penjualan dadah berbahaya, sama ada pembelaan mempunyai peluang untuk menjumpai asas baru untuk sabitan. Ujian yang sama juga boleh digunakan apabila pihak pendakwaan menjuruskan bukti kepada rujukan yang tidak dibuat di dalam ucapan pembukaan. Ianya diikuti bahawa, ianya tidak boleh tidak termasuk secara automatik tanpa apa-apa pertimbangan elemen prejudis. Yang mana prosedur hanya menerangkan tidak perlu diikuti, beban adalah terhadap pembelaan untuk menunjukkan cara ianya memprejudiskan, diikuti dengan balasan daripada pihak pendakwaan (lihat perenggan 30).

(5) (oleh**Augustine Paul HMP**) Bantahan peguamcara yang bijaksana ke atas penggunaan anggapan pengedaran terhadap tertuduh adalah tidak disokong oleh butiran yang memprejudiskan bahawa pembelaan berkemungkinan terjejas. Oleh itu, tugas tersebut jatuh kepada mahkamah ini untuk menentukan sama ada tertuduh akan mengalami apa-apa yang memprejudiskan jika anggapan pengedaran digunakan terhadap tertuduh. Pengaktifan anggapan pengedaran di bawah s 37(da) Akta tersebut memerlukan bukti milikan sebenar dadah berbahaya oleh pihak pendakwaan. Bukti yang dikemukakan oleh pihak pendakwaan menunjukkan bahawa tertuduh adalah di dalam milikan sebenar dadah tersebut. Fakta bahawa tertuduh memeriksa balas saksi pihak pendakwaan atas isu milikan; bahawa beliau telah diberikan peluang untuk memanggil semula saksi-saksi untuk pendakwaan dan pembelaannya adalah menidakkan milikan bermaksud

bahawa beliau tidak akan diprejudiskan disebabkan sabitan berdasarkan milikan. Sewajarnya, anggapan mengedar di bawah s 37(da) akta tersebut boleh dimasukkan terhadap tertuduh yang mana terdapatnya bukti milikan sebenar (lihat perenggan 31–32).

(6) (oleh **Abdul Aziz HMP**) Sepatutnya tidak melihat kepada tafsiran satu-satu perkataan di dalam statut di dalam kamus undang-undang untuk menentukan maksud biasa kerana kamus undang-undang adalah biasa untuk memasukkan maksud yang telah dilanjutkan oleh statut tertentu melangkaui maksud biasanya untuk memberikan kesan terhadap polisi di sebalik statut. Makna yang dimaksudkan untuk 'penjualan' adalah 'untuk … penghantaran … barangan … untuk wang'. Sepanjang penghantaran adalah untuk wang — yang mana penghantaran dalam kes ini — adalah bertentangan dengan penghantaran sebagai hadiah atau untuk asas yang lain, ianya adalah penjualan walaupun wang untuk barangan yang dihantar tidak diserahkan kepada penjual. Oleh yang demikian, perbuatan menjual berlaku apabila barangan telah ditukarkan atau dihantar walaupun harga masih belum dibayar (lihat perenggan 38, 40–41).]

Notes

For cases on presumption of drug traficking, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2034–2041.

For cases on prosecution's case, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2807–2808.

Cases referred to

Chow Kok Keong v PP [1998] 2 MLJ 337 (refd)

Devilal & Anor v The State of Rajasthan AIR 1971 SC 1444 (refd)

Inland Revenue Commissioners v Littlewoods Mail Order Stores, Ltd [1962] 2 All ER 279 (refd)

Johnson v Miller [1937] 59 CLR 467 (refd)

King v The Queen [1986] 161 CLR 423 (refd)

Liew Sai Wah v PP [1968] 2 MLJ 1 (refd)

Mah Hong Ching & Anor v PP [2007] 1 MLJ 123 (refd)

Pendakwa Raya v Norfaizal [2004] 1 AMR 310 (refd)

PP v Chua Chor Kian [1998] 1 MLJ 167 (refd)

PP v Kang Choo Heng & Anor [1991] 3 CLJ 2574 (refd)

R v Franco [2003] SASC 140 (refd)

R v Solomon [1980] 1 A Crim R 247 (refd)

Sundararawier & Co v State of Andhra Pradesh AIR 1958 SC 468 (refd)

Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283 (refd)

Legislation referred to

Criminal Procedure Code, ss 158, 159, 160, 162, 179(1), 422
Criminal Procedure Code [India] s 465
Dangerous Drugs Act 1952 ss 2, 12(3), 37(d), (da), 39B(1)(a), (b), (c), (2)
Evidence Act 1950 s 138(4)
Penal Code s 34

Wong Chiang Kiat (Deputy Public Prosecutor) (Attorney General) for the appellant.
Karpal Singh (Ramkarpal Singh with him) (Karpal Singh & Co) for the respondent.

Augustine Paul FCJ:

[1] This appeal brings into focus two issues of considerable importance in a criminal trial. They relate to the meaning of the expression 'selling' in the definition of 'trafficking'in s 2 of the Dangerous Drugs Act 1952 ('Act') in a prosecution for drug trafficking and the extent to which the case for the prosecution is restricted to what was stated in the opening address.

[2] The accused (the respondent before us) was charged in the High Court at Johore Bahru for trafficking in dangerous drugs under s 39B(1)(a) of the Act read with s 39B(2) of the Act with one Mohd Saupi bin Jusoh in furtherance of their common intention as provided by s 34 of the Penal Code. Both the accused persons claimed trial to the charge. At the conclusion of the case for the prosecution the learned judge acquitted and discharged Mohd Saupi bin Jusoh without calling upon him to enter his defence. He was of the view that the prosecution had made out a case against the respondent based on the presumptions contained in ss 37(d) and 37(da) of the Act. Having amended the charge with the omission of the ingredient of common intention the learned judge called upon the respondent to enter upon his defence. At the conclusion of his case he was found guilty. He was then convicted and sentenced according to law. His appeal to the Court of Appeal was allowed with a substitution of the conviction under s 39B(1)(a) of the Act with one under s 12(3) read with s 39A(2) of the Act. This appeal is by the prosecution against the order made by the Court of Appeal.

[3] In order to have a proper appreciation of the arguments advanced before us by both parties it is necessary to bear in mind the facts of the case as outlined by the Court of Appeal. It reads as follows:

> According to the prosecution's case, on 8 September 1991 Chief Inspector Nordin bin Kadir (PW5) attended a briefing at which those present were informed that Detective Lance Corporal Chee Kar Wah (PW7) would act as an agent provocateur to buy some drugs. Later that day, five meetings took place between PW7 and the appellant. The first meeting was held at 8pm; the second meeting at about 8.15pm; the third meeting at about 9.10pm; the fourth meeting at about 10.25pm and the fifth and final meeting at 11.45pm. The first to the fourth meetings took place in the vicinity of Merlin Tower in Johor Bahru. At the first meeting PW7 was introduced to the appellant by an informer. At the second meeting some preliminary negotiations took place for the sale of cannabis by the appellant to PW7. At the third meeting an agreement was reached between the appellant and PW7 that the former would sell and the latter would purchase 4 kg of cannabis for the sum of RM6,000. However, the appellant wanted PW7 to show him the RM6,000 before the drug could be delivered. The fourth meeting took place at 10.25pm. At that meeting PW7 showed the appellant the RM6,000. At the same meeting the place at which the drug was to be handed over was agreed upon. It was to be the railway crossing along Tun Abdul Razak, Johor Baru. The fifth meeting took place at the designated meeting point at about 11.45pm. This is what happened. PW7 saw the appellant coming along on foot. He was carrying a plastic

bag. He went to a money changer's shop at which he placed the bag on the ground. He then went up to PW7 and asked him to go and pick up the bag. PW7 did so and returned to where the appellant was. PW7 then lit his cigarette lighter to check the contents of the bag. He found a substance which he suspected to be cannabis. Thereafter, PW7 lit his cigarette lighter once again. This was the pre–arranged signal. Upon seeing this, the police officers who were in the ambush party at the scene came up to the appellant and arrested him. The drug was seized. Subsequent chemical analysis established it to be 3686g of cannabis.

[4] It was observed by the Court of Appeal that the case for the prosecution is that the respondent sold the drugs in question to PW7 and had thereby trafficked in it. Gopal Sri Ram JCA in writing for the court then went on to say:

> So, the crucial question in this case is whether on the facts there had been a sale of the proscribed drug by the appellant to PW7. To answer that question we must interpret the word 'selling' appearing in the definition of 'trafficking' in s 2 of the Act which provides:
>
> In this Act, unless the context otherwise requires —
>
> > 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act.
>
> Before we express our view on the matter, we must remind ourselves upon a matter of critical importance in relation to the interpretation of statutes. It is this. The word 'selling' which we must interpret appears in a penal statute. It must therefore be given a strict construction. There are several authorities that support this proposition but it suffices that we cite three. In *Liew Sai Wah v Public Prosecutor* [1968] 2 MLJ 1, Viscount Dilhorne quoted the following passage from *Halsbury's Laws of England* Vol 36 p 415 para 631:
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> > It is a general rule that penal enactments are to be construed strictly and not extended beyond their clear meaning. At the present day, this general rule means no more than that if, after the ordinary rules of construction have first been applied as they must be, there remains any doubt or ambiguity, the person against whom the penalty is sought to be enforced is entitled to the benefit of the doubt.
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> The next authority is *Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 337 where in the specific context of s 2 of the Act, Edgar Joseph Jr FCJ said this:
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> > … the drugs legislation is a piece of highly penal legislation and therefore any ambiguity in it should be resolved in favour of the subject …
>
> Lastly, in *Public Prosecutor v Chua Chor Kian* [1998] 1 MLJ 167 where Suriyadi J referred to *Maxwell on Interpretation of Statutes* (12th Ed) at p 239 which reads:
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> > The principle applied in construing a penal Act is that if, in construing the relevant provisions, 'there appears any reasonable doubt or ambiguity', it will be resolved in favour of the person who would be liable to the penalty. 'If there is a reasonable interpretation which will avoid the penalty in any particular case', said Lord Esher MR, *'we must adopt*

that construction. If there are two reasonable constructions, we must give the more lenient one. That is the settled rule for the construction of penal sections'.

Applying the approach of strict construction, we note that s 2 of the Act does not employ the expressions 'agreement to sell' or 'agreement to buy' to fall within the definition of trafficking. Accordingly, in our judgment, a mere agreement to buy or sell a proscribed drug is not an act of trafficking within s 39B(1)(a) of the Act. Neither, we may add, do negotiations for a sale amount to the offence of trafficking within s 39B(1)(a). Whether they are caught by other provisions of the Act is a matter that must await decision in some future case.

On the facts of the present case, it is our judgment, that to constitute the act of 'selling' within s 2 of the Act, there must have been an actual delivery of the drugs by the appellant accompanied by the physical handing over of the agreed price by the agent provocateur in exchange. In other words, the transaction must have been completed. Anything short of this is insufficient on the instant facts as it would admit a more lenient; a more flexible; approach to the construction of a penal statute. And that, on the authorities already discussed, is impermissible. Needless to say such a completed transaction did not take place in the present instance because the trap was sprung too early …

Now, applying the law earlier discussed to the facts of the present case, we are satisfied that the evidence of the prosecution put at its highest merely established an agreement to sell the proscribed drug but not an actual selling of that drug. It follows from what we have said thus far that the conviction for trafficking cannot stand. However, there is abundant evidence that the appellant had actual possession of the proscribed drug. In these circumstances we have no alternative but to quash the conviction under s 39B(1) and substitute it with a conviction under s 12 read with s 39A(2) of the Act. The sentence of death is set aside.

[5] In his submission before us the learned Deputy Public Prosecutor referred to*Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560 and argued that the act of 'selling' within the meaning of s 2 of the Act does not require the purchase price to be paid upon delivery of the dangerous drugs. It was also submitted in the alternative that since the Court of Appeal had found that the respondent was in actual possession of the drugs the presumption of trafficking ought to have been invoked. In his reply learned counsel for the respondent supported the stand taken by the Court of Appeal in its view of the expression 'selling' by relying on the case of *Mah Hong Ching & Anor v Public Prosecutor* [2007] 1 MLJ 123 at p 129 where Gopal Sri Ram JCA said:

However, it is clear from the way in which the case for the prosecution was presented and argued in the court below — and this was readily conceded by the learned deputy who argued this appeal before us — that the prosecution's case against the accused was one of actual trafficking in that they sold the proscribed drug to PW4. Now, s 39B(1) creates three distinct offences of which trafficking is one. This is what the section says:

Section 39B

(1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia:

(a) traffic in a dangerous drug;

(b) offer to traffic in a dangerous drug; or

(c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug.

(2) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death.

In the present case, the prosecution put their case on the footing that the accused had trafficked in the drug in question. In other words, they put their case under s 39B(1)(a) of the Act. That was readily conceded by the learned deputy who argued the case before us. It is, and was, not the prosecution's case that the accused had offered to traffic in a dangerous drug. It is also not their case that the accused did or offered to do an act preparatory to or for the purpose of trafficking in a dangerous drug. In other words, the prosecution was not relying on s 39B(1)(b) or (c) of the Act. To emphasise the point once again, the case for the prosecution in the court below was, and before us is, one of actual trafficking within s 39B(1)(a) of the Act.

Trafficking is defined by s 2 of the Act as follows:

In this Act, unless the context otherwise requires:

'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act.

In relation to the facts of this case, it is, as I have already said, the prosecution's case that the accused sold the drug in question to PW4. The facts must therefore show — to use the expression in s 2 of the Act — a 'selling' of the drug to PW4. Mark, that the section does not say 'agreeing to sell' or 'offering to sell', or 'offering for sale' or 'negotiating a sale'. It says 'selling'. And; for reasons I shall give in a moment; in my judgment, the expression 'selling' in s 2 refers to an actual sale.

[6] In commenting on the alternative submission of the prosecution learned counsel said that there can be no reliance on the presumption of trafficking as the opening address is confined to a sale only. The submissions of both parties raise two issues for consideration. They are:

(a) the meaning of the expression 'selling' in s 2 of the Act;

(b) whether there can be reliance on the presumption of trafficking in view of what was stated in the opening address.

We shall now consider both the issues.

(a) *The meaning of the expression 'selling' in s 2 of the Act*

[7] The Court of Appeal rightly said, on the authority of cases such as *Liew Sai Wah v Public Prosecutor* [1968] 2 MLJ 1, *Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 337 and *Public Prosecutor v Chua Chor Kian* [1998] 1 MLJ 167 that the

expression 'selling' in the definition of 'trafficking'in s 2 of the Act must be strictly construed as it forms part of a penal statute. This rule of construction requires that when there is an ambiguity or doubt in the meaning of a word in a penal statute it must be resolved in favour of the subject. Accordingly, the Court of Appeal said that in order to constitute 'selling' within the meaning of s 2 of the Act there must have been an actual delivery of the drugs accompanied by the physical handing over of the agreed price. This construction was formulated as s 2 of the Act does not employ the expressions 'agreement to buy', 'agreement to sell' or 'negotiations for a sale'.

[8] In determining the proper meaning of the expression 'selling' in the definition of 'trafficking'in s 2 of the Act a better approach would have been to first ascertain its ordinary meaning. As *Bindra's Interpretation of Statutes* (9th Ed) says at p 394:

> It is a rule of construction of statutes that in the first instance the grammatical sense of the words is to be adhered to. The words of a statute must prima facie be given their ordinary meaning.

[9] The expression 'selling' is the action of the word 'sell'. It is defined in *Webster's New World Dictionary* 3rd Ed as follows:

> sell (sel) vt sold, selling … 1. to give up, deliver, or exchange (property, goods, services etc) for money or its equivalent. 2 (a) to have or offer regularly for sale; deal in (a store that sells hardware, to sell real estate) (b) to make or try to make sales in or to (to sell chain stores). …

It is defined in *Butterworths Australian Legal Dictionary* as follows:

> Sell. To barter or exchange; offer, agree or attempt to sell; expose, send, forward or deliver for sale; cause or permit to be sold or offered for sale.

[10] The expression 'selling' is therefore of wide import. It starts with the offering for sale of something till it is sold. In other words it is a reference to a contract to sell in the future and a present sale. In view of the specific offences of offering to traffic in a dangerous drug under s 39B(1)(b) of the Act and the doing or offering to do an act preparatory to or for the purpose of trafficking in a dangerous drug under s 39B(1)(c) of the Act the expression 'selling' in s 2 of the Act is ambiguous. It is ambiguous as its ordinary meaning is wide enough to include acts which are offences under other provisions of the Act. It is a fundamental principle in the construction of statutes that the whole and every part of the statute must be considered in the determination of the meaning of any of its parts (see *Sundararawier & Co v State of Andhra Pradesh* AIR 1958 SC 468). This will have the effect of removing the ambiguity in the meaning of the expression 'selling'. Thereafter it must be construed as any other word in a statutory provision. As *Bindra's Interpretation of Statutes* (9th Ed) says at p 1081:

> However, if there is no ambiguity, and the act or omission in question falls within the mischief of the statute, the construction of a penal statute differs little, if at all, from that of any other.

And at pp 334–335:

> The strict construction of a criminal statute does not mean such construction of it as to deprive it of the meaning intended. Penal statutes must be construed in the sense that best harmonises with their intent and purpose. The more correct version of the doctrine appears to be that statutes of this class are to be fairly construed and faithfully applied according to the intent of the legislature, without unwarrantable severity on the one hand or unjustifiable levity on the other, in cases of doubt the courts inclining to mercy. A penal statute has, no doubt, to be construed strictly, but the intention of the legislature must govern in the construction of a penal statute as much as any other statute.

[11] Thus the offences that come within the ambit of s 39B(1)(b) and (c) must be excluded in the construction of the expression 'selling' in the definition of 'trafficking'in s 2 of the Act. It must therefore be construed as a reference to a 'sale' that has passed these stages. That would be a reference to a present sale and not to one in the future. This raises for consideration the precise nature of what a 'sale' in this sense means. As *The Law Lexicon* by Ramanatha Aiyar says at p 1146:

> SALE AND CONTRACT TO SELL. There is a fundamental distinction between a contract to sell in the future and a present sale — often expressed by 'executory' and 'executed' sales. It depends upon whether the property in the goods is transferred. If transferred, there is a sale though the price be not paid, if not transferred it is a contract of sale; even though the price be paid (Williston, Sales). Conditional sales constitute an intermediate class — the assent to the transfer though not the transfer, being given at the time the bargain is made. Such transactions partake more of the nature of sales than of contracts of sale, the title being transferred by force of the original bargain.

[12] Reference may also be made to *Inland Revenue Commissioners v Littlewoods Mail Order Stores, Ltd* [1962] 2 All ER 279 where in considering the meaning of the word 'sale' at p 283 Viscount Simonds relied on *Benjamin on Sale* (8th Ed) p 2:

> It (a sale) may be defined to be a transfer of the absolute or general property in a thing for a price in money. Hence it follows that, to constitute a valid sale, there must be a concurrence of the following elements, viz: (1) Parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised.

[13] Where the property has been transferred and the price has not been paid the contract becomes executed with a cause of action for the unpaid price. This was articulately explained by Gopal Sri Ram JCA in *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283 at p 290:

> Now, it is well settled that consideration may be executory or executed. If A agrees to mow B's lawn for RM10 and B agrees to pay him RM10 in exchange for this service, there is, in the eyes of the law, a valid and binding agreement between A and B. This is borne out by the words of s 2(e) of the Contracts Act 1950 which declares: 'every promise and every set of promises, forming the consideration for each other, is an agreement.
>
> The consideration in such a case is said to be executory, namely, the exchange of the mutual promises. When the lawn is mowed, the act promised has been done and the consideration is said to have become executed. It is not and has never been the law of this country that to support an agreement, consideration must always be executed. Executory consideration

suffices. Of course, A's right to sue for the RM10 may not arise until he has performed his part of the bargain or has been prevented by B from performing it.

The illustration we have given and the principle we have stated are so elementary that they may be found in any standard work upon the subject. But we have been compelled to do so because a reading of the judge's note of the proceedings in the court below has left us with the distinct impression that these elementary propositions may have been misunderstood by the appellant and by the court.

[14] A sale is therefore complete upon transfer of the property in the goods even though the price has not been paid. A sale in this sense cannot therefore be described as an act preparatory to the sale or as negotiations leading to the sale or even as an agreement for a sale. Alauddin Mohd Sheriff FCJ and Abdul Aziz Mohamad FCJ have in a separate judgment expressed agreement with this conclusion through a different process of reasoning.

[15] The Court of Appeal has therefore erred in its construction of the expression 'selling' in the definition of 'trafficking'in s 2 of the Act with the result that the substitution of the conviction of the accused on this ground cannot be sustained.

(b) *Whether there can be reliance on the presumption of trafficking in view of what was stated in the opening address*

[16] The opening address of the learned Deputy Public Prosecutor in the High Court reads as follows:

Pada 8 September 1991 jam lebih kurang 7 malam, satu operasi jualbeli dadah telah dirancang untuk menangkap pengedar dadah di mana Det Konst Chee Kar Woh telah ditugaskan menyamar sebagai pembeli dadah yang akan berjumpa dengan pengedar tersebut di kawasan Hotel Merlin Tower Johor Bahru pada malam tersebut.

Pada jam lebih kurang 8 malam hari yang sama, tertuduh pertama telah bertemu dengan Det Konst Chee Kar Woh di kawasan Hotel Merlin Tower Johor Bahru dimana perbincangan jualbeli dadah telah diadakan. Hasil perbincangan lanjut yang telah dibuat, tertuduh telah bersetuju menjual ganja kepada Det Konst Chee Kar Woh dan tempat penyerahan telah dipersetujui dibuat di kawasan tempat rehat di tepi jalan Tun Abdul Razak Johor Bahru. Maklumat perbincangan telah disampaikan oleh Det Konst Chee Kar Woh kepada Insp Nordin Kadir. Pasukan Cawangan Anti Dadah Johor Bahru yang diketuai oleh Insp Nordin Kadir kemudian telah mengatur satu serbuan di kawasan tempat rehat di tepi jalan Tun Abdul Razak, Johor Bahru.

Berikutan daripada serbuan tersebut, pasukan polis telah berjaya menangkap kedua-dua tertuduh dan telah merampas satu beg plastik yang mengandungi dua blok padat bahan tumbuhan kering disyaki ganja.

Dadah yang dirampas telah dihantar ke Jabatan Kimia Johor Bahru dan dari analisa yang dijalankan dadah tersebut adalah cannabis yang beratnya ialah 3,686 gram.

[17] The opening address clearly refers to only an act of selling dangerous drugs. There is no reference to possession of the dangerous drugs by the accused. Thus what

is stated only requires proof of the circumstances that led to the sale. It is those circumstances that the defence would be required to rebut and not the fact of whether the accused was or was not in possession of the dangerous drugs. The activation of the presumption of trafficking, on the other hand, requires proof of possession. As no indication of this mode of proof of the case for the prosecution is contained in the opening address the question that requires to be addressed is whether there can be a conviction on a basis which has not been disclosed.

[18] The duty of the prosecution to make an opening address is governed by s 179(1) of the Criminal Procedure Code ('s 179(1)'). It reads as follows:

> The officer conducting the prosecution shall open his case by stating shortly the nature of the offence charged and the evidence by which he proposes to prove the guilt of the accused.

Sarkar on Criminal Procedure (7th Ed) in commenting on s 226 of the Indian Criminal Procedure Code, which is similar to s 179(1), says at pp 749–750:

> *Scope and application* — In opening the case the public prosecutor should describe the charge against the accused and give a brief summary of the evidence by which he proposes to prove the case (*Richard*, 1975 Cr LJ 1256 (C)). The opening prosecution address should be concise and clear. It should be scrupulously fair. The prosecutor's duty is not to secure a conviction but simply to lay the facts of the case before the tribunal which is to judge. The prosecutor is not the party aggrieved and he should proceed to discharge his duties without exhibition of any feeling. The great principle that runs through the criminal law is that an accused is to be presumed innocent so long as he is not proved to be guilty by the prosecution. He is not bound to say anything in defence. As to the duties of public prosecutor, see post.
>
> In criminal trials it is of prime importance for the accused to know as to what the exact prosecution case is. If the pivot of the prosecution case is not accepted a new case cannot be made out to imperil defence (*Devilal*, A 1971 SC 1444).
>
> *Guiding principles for opening prosecution case* — Some well-established rules as to opening may be stated here for guidance:
>
> (1) The charge against the accused should be clearly and concisely stated by describing it. The offence should be described in plain language avoiding legal jargons as much as possible.
>
> (2) The leading facts of the case upon which the prosecution rely should then be briefly stated with precision and clarity arranged in orderly succession so as to give continuous and so far as possible chronological narration, that is to say, what are the items or pieces of evidence on which the prosecution would rely and which the prosecution would prove to establish the charge against the accused. Nothing should be stated that has no direct bearing upon the issue or which cannot be proved. A case should never be over-stated.
>
> (3) In opening the case the prosecutor can only state all that it is proposed or intended to prove, declarations of the accused or facts, so that the Judge may see if there is any discrepancy between the opening statements and the evidence afterwards adduced.
>
> (4) Nothing should be said in the opening in anticipation of the defence that may be set up. The prosecutor will have the opportunity when summing up or replying.

[19] In commenting on the need for the accused to know what the exact prosecution case is Ray J said in *Devilal & Anor v The State of Rajasthan* 1971 SC 1444 at p 1446:

> Counsel for the appellants was correct in raising the principal contention in the fore-front that the accused did never know that this was the prosecution case. It would rightly be said that if the bedrock of the prosecution case that Brijlal and Nathu came armed with guns to throw a challenge to Motaram and his sons could not prove as a fact, the whole prosecution case would fall like a pack of cards. In criminal trials it is of prime importance for the accused to know as to what the exact prosecution case is. If the pivot of the prosecution case is not accepted a new prosecution case cannot be made to imperil defence. In the present case, two of the accused are held both by the trial court and by the High Court not to have been anywhere near the scene of occurrence. The entire prosecution case was that those two persons pointed to the enemies, namely, Motaram and his son and nephew. The further prosecution case was that those two persons gave the order to the accused to attack them. Those two persons opened the gun fire. Therefore when those two persons are found both by the Sessions Court and the High Court not to have been present the whole prosecution case changes colour and becomes unworthy of belief.

[20] Similarly, Dixon J said in *Johnson v Miller* [1937] 59 CLR 467 at pp 489–490:

> Where an information or complaint is so drawn as to disclose more than one offence and one set of facts amounts to each of the various offences covered by the charge, as was the case in *Johnson v Needham* [1909] 1 K B 626; 100 L T 493, the proper course is to put the complainant to his election. In such a case, to wait to the end of his evidence before doing so may be convenient and may cause no injustice. But it is the converse of the present case, where the question is whether the prosecutor should not be required to identify one of a number of sets of facts, each amounting to the commission of the same offence as that on which the charge is based. In my opinion he clearly should be required to identify the transaction on which he relies and he should be so required as soon as it appears that his complaint, in spite of its apparent particularity, is equally capable of referring to a number of occurrences each of which constitutes the offence the legal nature of which is described in the complaint. For a defendant is entitled to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge. The court hearing a complaint or information for an offence must have before it a means of identifying with the matter or transaction alleged in the document the matter or transaction appearing in evidence.

[21] In *King v The Queen* [1986] 161 CLR 423, Deane J said at pp 428–429:

> Because the Crown had adopted the undesirable approach of framing its indictment in the broadest terms it had subjected the applicant to the wide jeopardy of a trial on that indictment. But once the Crown elected at the trial to confine its case against the applicant with the result that the trial was conducted on that basis, it could not legitimately expect that it could, after evidence and addresses had been completed, seek, through the trial judge's summing up, to obtain a conviction on some other basis if it became apprehensive that the case which it had presented might be rejected by the jury.

[22] However, there may be instances where the prosecution has indicated the basis upon which it seeks a conviction and the evidence adduced demonstrates a further basis for conviction on the offence charged or an alternative offence which is available

at law. Is the prosecution bound by what was stated in the opening address in such circumstances? In resolving this issue the Court of Criminal Appeal of South Australia said in *R v Franco* [2003] SASC 140:

> Although it is desirable that the prosecution should indicate at the commencement of the trial the basis upon which it seeks a conviction, there will be cases in which the course of the evidence gives rise to the possibility of a further basis for conviction on the offence charged or the basis for a conviction on an alternative offence which is available at law. An important consideration for the trial judge in deciding whether to leave to the jury a path to conviction not previously mentioned is whether the accused has had an adequate opportunity to test evidence relevant to such reasoning, to call evidence relevant to it, and to address the jury on it.
>
> A trial judge is not bound by the prosecutor's formulation of its case. It may be necessary for the judge to consider whether it is appropriate to leave alternative verdicts to the jury or direct on alternative paths to conviction irrespective of whether such alternatives are relied upon by the prosecution. However, it is essential when considering such a course to have regard to whether unfairness would result if, through no fault of the defence, the alternative basis had not been properly addressed during the trial.

[23] The function of the trial judge and the approach to be adopted by an appellate court in these circumstances were summarised by Street CJ in *R v Solomon* [1980] 1 A Crim R 247 at pp 249–250:

> Ordinarily, it is the province of the Crown to formulate and present the case for the prosecution which will, in due course, be summed up by the judge to the jury. There may, however, be other matters of fact or law which the trial judge, in the discharge of his duty to ensure a fair trial according to law, considers it necessary to put to the jury, even though not propounded or developed by the Crown. The fairness or unfairness of travelling beyond the ground covered by the Crown will, of course, be evaluated by the trial judge and will be to the forefront in his deciding how far, if at all, to put new considerations to the jury. It seems to me that, where a judge does cover fresh ground in terms that are correct in law and properly based on evidence in the case, at the highest his decision so to do will only be challengeable if it can be seen that the accused person was thereby placed at a tactical disadvantage. In such a situation, appellate intervention would be appropriate, not by reason of the judge having canvassed fresh ground simpliciter, but by reason of unfairness attending his so doing. The relevant unfairness will ordinarily be looked for in procedural considerations. The judge, drawing upon his own forensic experience, will be readily appreciative of the tactical considerations which will have governed counsel in the conduct of the case for the accused. Objections to evidence, lines of cross-examination and decisions upon the material to be advanced on behalf of the accused, not to mention the general trend of the final address to the jury made on behalf of the accused, will all, of course, have been governed by the nature of the Crown case as opened by the prosecutor and developed through evidence tendered on behalf of the Crown at the trial. It is readily understandable that within these procedural and tactical fields there could arise an element of real prejudice if the judge, in his summing-up, raises new approaches available to, but not expressly relied upon, by the Crown. But in every case in which a question arises regarding the development of new approaches, the question concerning the judge at first instance, and on appeal the question concerning this Court, will be to determine whether in so doing there will be worked an unfairness to the accused.

As Moffitt P said in the same case at p 253:

Before turning to the question whether an issue not raised in the Crown case should be treated similarly to a defence not raised on behalf of an accused, a different matter should be mentioned, in order to dispose of it. It is the province of the judge to direct the jury on any matter of law which is relevant to a determination by them of the question before them. It is the province of the jury to determine whether the accused is guilty of the offence on which he is charged upon the evidentiary material laid before them. The duty of the judge to determine what law is relevant and to direct the jury thereon cannot be circumstanced by what counsel may say or omit to say concerning the law. The province of counsel is to address on the facts and any reference to the law is tentative and is only permissible in order to relate submissions on the facts to questions at issue. The Crown in opening its case is not obliged to limit it by referring to the applicable law. Of course it ought to indicate fairly what the Crown case is so that the accused has a proper opportunity to meet it. The province of the trial judge then is to put to the jury such alternate ways as in law are open to them upon the evidence to find the offence charged.

Questions can only arise, as they do here, where the Crown has confined its case in some way. The question which then arises is whether it is fair to leave to the jury an issue not raised by or abandoned by the Crown. The Crown may confine the issue by defining its case in opening. One way of doing this is by stating that the Crown relies on one only of several alternate ways in law in which the offence may be committed. If the judge then directs the jury on an alternative, not part of the Crown case or abandoned by the Crown, while this will be a direction on the legal issue raised on the pleadings, ie arising from the charge and plea of not guilty, a question may arise whether there has been a miscarriage of justice by reason of the conduct of the trial.

And at pp 254–255:

As to the issue arising on the pleadings, the parallel in a criminal trial is the issue which arises from the crime pleaded by the charge and the plea of not guilty. A conviction upon a charge of murder is sustainable on the pleadings upon evidence which establishes murder upon any definition thereof. However, upon the parallel of the civil law, unless the beneficial rule which favours an accused is applied to the Crown, the Crown in the court's discretion may be held to the issues raised in the sense that the judge will not enlarge or permit the Crown to enlarge the issues unless satisfied that this course will not be unfair to the accused.

There is no authority, to which we have been referred or of which I am aware, which requires the judge to leave to the jury an alternative basis of guilt not part of the Crown case or abandoned by it. To do so without the judge being satisfied that there will thereby be no unfairness to the accused would be contrary to the philosophy upon which the administration of the criminal law is based. With respect, the view apparently taken by his Honour, as his rhetorical question indicates, that it was his responsibility to sum up in accordance with the law on the facts as they come out 'however … the Crown has conducted its case' is not correct. That a decision open on the crimes pleaded and upon the evidence led, may be vitiated by unfairness, by reason of the issue open not being properly raised and submitted to the jury is supported by the authority of *Lincoln* (1944) 29 Cr App R 191, at p 194. Of course what I have said depends on the Crown having confined its case in some respect, a conclusion not to be come to merely because only some aspect of the applicable law is referred to in address. In the present case no such difficulty arises because of the concessions of the Crown.

The question which therefore arises for our determination is whether it can be seen that submission of the issue not part of the Crown case did not operate unfairly to the appellant. Because of the view his Honour took of his province he did not profess to consider this

question. His Honour directed the jury at some length upon the legal questions necessary to be considered before a finding of murder based on a reckless indifference to human life could be found. Included were directions that the recklessness 'must have involved foresight of or advertence to the deaths or grievous bodily harm resulting from … the act of thrusting the sheep shears towards the chest of the deceased in the bar in the circumstances which you find in fact obtained at the time'. He detailed the evidence in the case as a whole at considerable length, reading much of it and contrasting what different witnesses said. However, he did not indicate to the jury which of the many versions of what occurred or which parts of the evidence could support an inference that the appellant had the requisite attitude of recklessness as defined. He did not illustrate by reference to the type of events disclosed by the evidence, how the directions given might be applied. In fact even in respect of the other elements of the definition of murder, his Honour did not relate his directions of law to the evidence detailed. No complaint is or was made on this score and it should be assumed that his Honour adopted this course because of the content of the evidence and the conduct of the trial, perhaps because of some failure of counsel to nominate the particular of the many versions of the facts relied upon. That counsel may have done so is understandable because of the confused and conflicting accounts of what occurred. Upon the question of how the judge should deal with the facts, the conduct of the trial is important (*Smart* (1963) NSWR 706 at pp 712–716), and it may be that his Honour considered it would be undesirable for him to emphasise by selection some particular of the many available versions or inferences as to what occurred.

[24] In dealing with the proper way in which a conviction can be secured on a basis not opened by the prosecution, Moffitt P said at pp 256–257:

> With respect, where it appears to a presiding judge that the evidence in the case leaves open a finding say of murder on a basis not opened by a Crown Prosecutor, the better course is to raise the matter with counsel prior to final addresses. Then, according to the responses of counsel, a decision can be made whether it is appropriate that the direction be given. Counsel can be informed of the proposal with the result that the jury will have the benefit of the submissions of both counsel upon the question. The accused then will not be deprived of the opportunity of having submissions made thereon on his behalf. If counsel for the accused claims he has been deprived of some opportunity to cross-examine or lead evidence, the presiding judge will be in a superior position to consider any question of prejudice. This did not occur.
>
> It was further contended at the trial and before us that counsel for the appellant was also deprived of an opportunity to cross-examine witnesses on the omitted issue. It may well be that no additional question would or could have been asked and we were not told of any such, but I am inclined to the view that similar considerations apply as do in relation to counsel's address. However, the failure to raise the matter before counsel's address is sufficient in my view to render the trial unsatisfactory so that there was a miscarriage of justice requiring this court's intervention.

[25] It follows that a verdict can be founded on a basis not indicated by the prosecution in its opening address. But it must be done in such a way so as not to place the accused at a tactical disadvantage with resultant unfairness to him. This conclusion is consistent with s 422 of the Criminal Procedure Code ('the Code') which reads as follows:

Subject to the provisions contained in this chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of —

(a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this Code; or

(b) the want of any sanction; or

(c) the improper admission or rejection of any evidence,

unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[26] In commenting on s 465 of the Indian Criminal Procedure Code which is similar to s 422 of the Code Sarkar on *Criminal Procedure* (7th Ed) says at p 1367:

This is the residuary section in the chapter intended to cure any error, omission or irregularity committed by a court of competent jurisdiction in the courts(sic) of a trial through accident or inadvertence, or even an illegality consisting in the infraction of any mandatory provision of law, unless such irregularity or illegality has in fact occasioned a failure of justice. The object of the section is to secure justice by preventing the invalidation of a trial already held, on the ground of technical breaches of any provisions in the Code causing no prejudice to the accused. The intention is to eliminate all possibilities of acquittal of persons committing offences except on the merits.

[27] The prejudice that may be caused to the accused as a result of a different course being adopted to secure a conviction may be obviated by several methods. Where the evidence adduced discloses an offence other than the subject matter of the original charge and the opening address the charge may be amended accordingly on the authority of s 158 of the Code. The Code contains sufficient safeguards to ensure that the accused is not prejudiced by an amendment to the charge. Of significance is s 162 of the Code which reads as follows:

Whenever a charge is altered or added by the court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or resummon and examine, with reference to such alteration or addition, any witness who may have been examined, and may also call any further evidence which may be material.

[28] Pursuant to s 159 of the Code the court shall proceed with the trial only if the accused is ready to be tried on the amended charge, and, if not ready, only if the court is satisfied that proceeding immediately with the trial will not cause any prejudice to the accused. Section 160 of the Code provides that if proceeding immediately with the trial is likely to prejudice the accused the court may either direct a new trial or adjourn the trial for such period as may be necessary. On the other hand where the evidence adduced discloses a different basis for conviction on the original charge itself the prejudice that may be caused to the accused can be avoided by an intimation to the defence of the course to be adopted. The defence will, in that event, have the opportunity to reply to the proposed course to be followed and may, if it so desires, recall any witnesses for further cross-examination pursuant to s 138(4) of the Evidence Act 1950. This will remove any prejudice that may be caused to the accused

by the course to be adopted. There will also be no prejudice to the accused if the case was conducted by the defence and or by the prosecution on the line of the new basis for conviction. In short the determinative factor is whether the defence has had the opportunity to meet the new basis for conviction. A similar test is also applicable when the prosecution leads evidence to which no reference has been made in the opening address. It follows that it cannot be automatically excluded as done in cases such as *Public Prosecutor v Kang Choo Heng & Anor* [1991] 3 CLJ 2574 and *Pendakwa Raya v Norfaizal* [2004] 1 AMR 310 without any consideration of the element of prejudice. Where the procedures just described have not been followed the burden will be on the defence to show the manner in which it has been prejudiced followed with a reply by the prosecution.

[29] The objection of learned counsel to the use of the presumption of trafficking against the accused was not supported by particulars of the prejudice that the defence may suffer. Neither did the prosecution comment on this aspect of the defence submission. The task therefore falls on us to determine whether the accused will suffer any prejudice if the presumption of trafficking is invoked against the accused. The activation of the presumption of trafficking under s 37(da) of the Act requires proof of actual possession of the dangerous drugs by the prosecution. In the opening address there is no mention of possession of the dangerous drugs by the accused. It only refers to the arrangement made between the accused and PW7 for the sale of the drugs. However, the evidence adduced by the prosecution shows that the accused was in actual possession of the drugs. The notes of evidence reveal that witnesses who testified on this issue were cross-examined by the defence. When the accused was called upon to enter his defence he declined to recall any of the prosecution witnesses. In this regard the notes of evidence at Jilid 2 p 128 reads as follows:

> (Peguam tertuduh memaklum ia tidak bercadang memanggil semula mana-mana saksi pendakwa).

[30] The examination-in-chief of the accused was wholly on the fact that the bag which contained the dangerous drugs was carried by one Ismail and not him. In his cross-examination he denied that he negotiated for the sale of the drugs with PW7. The examination-in-chief of his witness Mohd Saupi bin Jusoh (DW2) was also only on the question of possession. The submission of the defence at the end of the case was also only on the issue of possession of the bag containing the dangerous drugs. The facts that the accused cross-examined the prosecution witnesses on the issue of possession; that he was given an opportunity to recall witnesses for the prosecution and that his defence was one of negating possession mean that he will not be prejudiced as a result of a conviction based on possession. Accordingly the presumption of trafficking under s 37(da) of the Act can be invoked against the accused as there is evidence of actual possession.

[31] Be that as it may, there is no necessity to consider the case against the accused on the line just discussed in view of our determination of the meaning of the expression 'selling' in s 2 of the Act. Thus it is our view that the accused is guilty of the offence as charged of selling the dangerous drugs in question.

[32] In the upshot, the appeal by the prosecution is allowed. The order made by the Court of Appeal is therefore quashed and the conviction and sentence imposed by the High Court is reinstated.

Abdul Aziz Mohamad FCJ:

[33] I have had the opportunity of reading in draft the judgment of my learned brother Augustine Paul FCJ. I agree that the appeal be allowed and that the orders made by the Court of Appeal be quashed and the conviction of the respondent, and the sentence imposed, by the High Court be reinstated. I also agree with the decision of my learned brother on the two issues and with his reasons for the decision, except in one respect.

[34] It concerns the question of 'selling'. I wish, first of all, to observe that the Court of Appeal did not cite any authority for holding that to constitute 'selling' in the definition of 'trafficking'in s 2 of the Dangerous Drugs Act 1952, there must be not only 'an actual delivery of the drugs', which happened in this case, but also 'the physical handing over of the agreed price', which did not happen in this case. Neither was Encik Karpal Singh, the respondent's counsel, able to cite any authority that requires the delivery of the price. He informed us that there is no such authority.

[35] I agree with my learned brother that we have first to ascertain the ordinary meaning of 'selling' and to do that by looking at the dictionary meaning of the root word 'sell'. My learned brother refers to *Webster*'s and two meanings that it gives, and says, after considering also the definition in *Butterworths Australian Legal Dictionary* and I believe by taking into account *Webster*'s meaning No 2 as well, that 'selling' is 'of wide import' and 'starts with the offering for sale of something till it is sold' and therefore includes offering to sell and doing, or offering to do, an act preparatory to or for the purpose of selling, which are already offences under paragraphs (b) and (c) of s 39B(1), and which for that reason must be excluded in construing the word 'selling' in the definition of 'trafficking'.

[36] I am of the view that to determine the ordinary meaning of a word in a statute one ought not to look at the definition of the word in a legal dictionary because the legal dictionary is apt to include meanings that have been extended by particular statutes beyond their ordinary meaning to give effect to the policy behind the statutes. In *Butterworths,* for example, the entry for 'sell' ends with the words 'for example (NSW) Liquor Act 1982 s 4'.

[37] As to meaning No 2 in *Webster*'s, I am of the view that it is looking not to specific acts but basically to the pursuit of a vocation or trade or business, as may be understood from the given example of 'a store that sells hardware'. I see a shop or a man and ask what the shop sells or what the man does, and someone tells me that the store sells hardware or the man sells hardware, although at the particular time the store is closed and no activity is going on in it or the man is drinking coffee in a restaurant and is not anywhere near any hardware or doing anything about hardware. That, I think, is what meaning No 2 has in mind. It is akin to what is stated in

The Oxford English Dictionary (2nd Ed) Vol XIV, at p 935 under meaning No 3a: Also, in habitual sense, of a shopkeeper, etc.: To deal in or keep for sale (a particular commodity).

[38] For my part, in considering the dictionary meaning of 'sell' for the purpose of determining the ordinary meaning of 'selling' in the definition of 'trafficking', I would reject *Webster*'s meaning No 2, without having to resort to the existence of paragraphs (b) and (c) of s 39B(1), as one that could not have been intended by the legislature. The meaning intended is meaning No 1, which for the present case is 'to … deliver … goods … for money'. So long as the delivery is for money — which the delivery in this case was — as opposed to delivery as a gift or on some other basis, it is selling even though the money for which the goods are delivered has not passed to the seller.

[39] Finally, I would add that in my view the passage cited by my learned brother from *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283 does not assist in determining the question that has arisen in this case, namely, whether one can be said to 'sell' goods when one delivers the goods but has not received the price for them. The passage, and the example given in it of an agreement to mow a lawn for reward, is intended to drive home the point that the consideration to support an agreement need not always be executed. It would no doubt be correct to say, as my learned brother does, using the analogy of the agreement to mow a lawn, that 'Where the property has been transferred and the price has not been paid the contract becomes executed with a cause of action for the unpaid price', provided it is a contract to transfer property for a price. But where it is an agreement to sell goods, that statement is not equivalent to saying that at the time of transfer or delivery of the goods the act of selling takes place. I am of course of the view that the act of selling takes place once the goods are transferred or delivered even though the price has not been paid, but it would not be in reliance on anything in the passage.

[40] My learned brother, Alauddin FCJ, who has seen this judgment in draft, has indicated that he agrees with what I have said.

Appeal allowed.

Reported by Loo Lai Mee